

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

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MATTHEW RAYMOND,

Plaintiff,

vs.

9:18-CV-1467

TROY MITCHELL, et al.,

Defendants.
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Transcript of a Telephone Conference held on
December 18, 2019, at the James Hanley Federal
Building, 100 South Clinton Street, Syracuse,
New York, the HONORABLE ANDREW T. BAXTER, United
States Magistrate Judge, Presiding.

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A P P E A R A N C E S

(By Telephone)

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BY: PATRICK MACKEY, ESQ.

For Defendant: MEYERS BUTH LAW GROUP
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BY: CHERYL MEYERS BUTH, ESQ.

Also Present: STATE OF NEW YORK
Office of Attorney General
300 S. State Street
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Syracuse, New York 13202
BY: AIMEE COWAN, ESQ.

1 (In Chambers, Counsel present by telephone,
2 2:32 p.m.)

3 THE COURT: Okay, good afternoon, this is Judge
4 Baxter, this is Raymond versus Mitchell, et al.,
5 9:18-CV-1467. We have Ms. Freeman for the plaintiff,
6 Mr. Mackey for all of the defendants except Hoppins, Ms. Buth
7 for defendant Hoppins, and Aimee Cowan who is from the AG's
8 Office and was former counsel for all of the defendants. I
9 apologize in advance if I sneeze or cough during this, I'm
10 fighting a cold here.

11 So, I know, I'm sure both attorneys are getting up
12 to speed a little bit, but the first order of business is to
13 address the discovery issues that were raised on behalf of
14 plaintiff back in late July in Docket Number 24, which have
15 been in limbo while Ms. Cowan has tried to coordinate the
16 appointment of replacement counsel for all the defendants
17 based on some conflict of interest that developed.

18 We did get a response from Mr. Covert's office, who
19 I'm assuming is a partner of Mr. Mackey, or an associate of
20 Mr. Mackey?

21 MR. MACKEY: Yes.

22 THE COURT: But I will say that, you know, while I
23 understand the response and I guess I agree it's true that
24 the individual defendants don't necessarily have custody or
25 control over some of the information sought, the case law I

1 think is fairly clear that the fact that individual
2 defendants may not have custody or control over certain
3 information that is controlled by DOCCS does not allow the
4 defendants to avoid providing that sort of discovery, and it
5 basically becomes incumbent upon counsel for the individual
6 defendants who are DOCCS employees to coordinate with DOCCS
7 counsel to get the relevant information that is not otherwise
8 objectionable.

9 So basically, that response, I just don't think
10 raises an appropriate objection to the discovery demands and
11 the discovery issues that were raised by the plaintiff.

12 Ms. Cowan and other Assistant Attorney Generals
13 obviously have a leg up in coordinating with DOCCS to get
14 information that would not necessarily be in the custody of
15 the individual defendants by virtue of the fact that she's an
16 Assistant Attorney General and also works for the state and
17 handles these kinds of cases frequently, so I recognize that
18 this is not necessarily something that the new counsel would
19 be used to doing. But it's something that needs to be done,
20 and I'm sure Ms. Cowan, although she obviously cannot
21 continue to represent the defendants, can give you some
22 guidance as to who to get in touch with at DOCCS and how to
23 get their input in terms of responding to these various
24 discovery issues that are raised in the July 31st, 2019
25 letter of plaintiff's counsel which, again, is Docket

1 Number 24.

2 The other thing I will say, and I, you know, I do
3 this based on 10 years of experience handling prisoner civil
4 rights cases, the magistrate judges in this district often
5 benefit from the experience of the Assistant Attorney
6 Generals who represent individual defendants in civil rights
7 cases in tempering the reflexive reaction of DOCCS counsel in
8 response to certain types of discovery motions which is
9 usually, you know, there's no way we're going to provide
10 this, it's objectionable and we need to resist it vigorously.
11 And you know, while the AAGs vigorously represent the
12 interests of their individual clients, they've come to
13 recognize that there are certain types of discovery issues on
14 which the courts have consistently ruled one way or the other
15 and they don't, you know, do combat on issues that have been
16 long resolved in numerous cases.

17 So, you know, I -- again, while it's difficult for
18 private counsel who don't have the experience of working this
19 as state lawyers, you know, I'm going to, I'm going to ask
20 you to, you know, be realistic and act consistently with case
21 law in addressing these discovery demands as opposed to
22 reflexively taking the DOCCS position that there's no way
23 we're going to produce stuff, even though they've lost on
24 similar issues numerous times.

25 So Ms. Cowan, I don't know if there's anything you

1 want to say in terms of what role, if any, you can play in
2 terms of helping the private lawyers with this transition,
3 given obviously that you can't represent the individual
4 defendants.

5 MS. COWAN: Yeah, I mean I can definitely put them
6 in touch with Chuck Quackenbush at DOCCS, he's usually who I
7 go through with respect to documents and any questions I have
8 so I can put him in touch with both of them, and I'm always
9 still available just to, you know, talk in general about
10 certain issues, so I can definitely make those connections
11 today.

12 THE COURT: Okay.

13 MR. MACKEY: Your Honor?

14 THE COURT: Yes, identify yourself, please.

15 MR. MACKEY: This is Patrick Mackey. I understand
16 what you're saying, your Honor. I guess, what I do want to
17 add is, there is some case law that basically holds that if,
18 if a plaintiff is looking for documentation from an
19 individual defendant, an individual CO, that because the
20 individual CO doesn't, you know, represent the state or DOCCS
21 in general, that they don't have access or possession to
22 those documents and that they wouldn't be required to produce
23 those documents.

24 Now I understand a plaintiff can always subpoena
25 the state or subpoena DOCCS or subpoena an agency that they

1 think has relevant documents that they may need for the
2 lawsuit, but I mean, I have two cases in front of me which
3 basically say that an individual CO, who essentially doesn't
4 have possession or control of those documents, is not the
5 party to be producing those documents.

6 THE COURT: Okay.

7 MR. MACKEY: One of the cases --

8 THE COURT: Okay, go ahead.

9 MR. MACKEY: One of the cases is *Evans v. Murphy*,
10 2013 WL 2250709, and that was a 2013 decision. The other was
11 more recent, 2017 decision, *Nelson v. Gleason*, 2017 WL
12 2984430, and basically --

13 THE COURT: 2017? 2017?

14 MR. MACKEY: Yes.

15 THE COURT: And what districts are they out of?

16 MR. MACKEY: These are Western District of New York
17 cases. I did look for some in the Northern District, I
18 wasn't able to locate any yet.

19 THE COURT: All right. Well, I will tell you, and
20 I'm -- you know, I'm not ruling out going down this road if
21 we have to go down this road, but there are variations from
22 district to district in terms of the prevailing authority,
23 and I am quite confident, and you can talk offline with
24 Ms. Cowan if you want to confirm this with a source that's
25 perhaps -- doesn't have a dog in the fight, but I think it is

1 fairly clear that in the Northern District of New York, when
2 reasonable discovery that was not otherwise objectionable is
3 requested from individual defendants in 1983 actions, which
4 are the only parties who can be sued and the state can't be
5 sued in those actions, that those plaintiffs, through
6 coordination with DOCCS counsel, are still responsible for
7 producing those documents if they are not otherwise
8 objectionable. And you know, I know there's some case law
9 that goes the other way from other districts, including the
10 Western District of New York, but that is an issue that I
11 think has long since been settled in this district.

12 MR. MACKEY: Understood, your Honor, I just wanted
13 to make -- bring those two cases to your attention. I mean
14 they basically hold for the idea that a plaintiff can't move
15 to compel a party to produce documents that are in the
16 possession of a nonparty. And again, I understand there's
17 means for doing that through subpoena and, you know, I've
18 handled other types of these types of cases and traditionally
19 that's how it's been handled on the plaintiff's end, they
20 would subpoena the agencies or the state offices that hold
21 these documents, so this is kind of the first time we've ever
22 run into this issue. But your Honor, I understand where
23 you're coming from, I just wanted to bring those cases to
24 your attention, if you have a chance to take a look at them.

25 THE COURT: Yeah, and as I say, I'm familiar with

1 this issue, we don't litigate it much in the Northern
2 District anymore because, as I say, it's fairly established
3 practice here. And you know, there is a distinction between
4 documents that a plaintiff might seek from the employer of
5 the individual defendants, which is usually DOCCS, and some
6 other state agency, and I agree with you if it's another
7 state agency, that the burden may shift to the plaintiff to
8 seek those documents by subpoena or otherwise. But in the
9 Northern District of New York, we do not allow the individual
10 defendants to hide behind DOCCS because otherwise we would
11 rarely get the discovery that is reasonably required to
12 litigate these cases, you know, whether it be the records of
13 the disciplinary proceedings or the reports from officers
14 other than an individual defendant relating to an excessive
15 force case or the medical records. None of those are in the
16 custody of individual employees but they're all typically
17 critical discovery in a civil rights case.

18 So, you know, I understand the authority that's out
19 there, I'm not being critical that that was your initial
20 response, and I, you know, I recognize that you're a
21 practitioner in the Western District of New York and were
22 probably picked just to reduce the possibility of, you know,
23 any further conflicts of interest, but you're playing on a
24 different court and, you know, the rules have been applied
25 differently.

1 MR. MACKEY: Understood, your Honor.

2 MS. FREEMAN: Your Honor, this --

3 MR. MACKEY: I'm sorry.

4 MS. FREEMAN: This is Emma Freeman for the
5 plaintiff, your Honor, I didn't mean to cut you off, I just
6 wanted to offer a few thoughts on this issue.

7 THE COURT: Go ahead.

8 MS. FREEMAN: So I don't feel the need to weigh
9 into the conversation that's already been had, I certainly do
10 agree that it's incumbent on the defendants at least
11 initially to work with DOCCS counsel. I think in light of
12 the letter that was submitted on behalf of the individual
13 defendants, that it would be beneficial for all parties to
14 set a date for the defendants, including Ms. Hoppins, to
15 provide us with a formal response to the document requests
16 and interrogatories. And I've agreed upon an interrogatory
17 response date, Mr. Mackey, with your colleague Ms. Perri
18 Roberts but not, Ms. Buth, I think with you yet for
19 Ms. Hoppins, but it's not clear to us at this point what the
20 defendants' position is with respect to all our requests and
21 even with respect to the specific issues that were raised in
22 the July letter. So for the sake of having clarity moving
23 forward with discovery in the case with new counsel, I would
24 ask the court to set a date for responsive objections and
25 production. And I'd also like with defense counsel, off the

1 line, to discuss an ESI protocol since there are a couple of
2 requests we propounded that would require searching social
3 media, text messages, et cetera.

4 THE COURT: And I, you know, as I recall from
5 revisiting the file, you had also proposed a protective order
6 which is typically critical in getting some of the
7 information that you have requested which you really never
8 got any, you know, buy-in from opposing counsel, again, in
9 part because of the developing conflict. But the parties
10 need to --

11 MS. FREEMAN: That's right.

12 THE COURT: -- they need to agree to -- or try to
13 agree to a protective order as well because that's, you know,
14 there are some valid DOCCS security concerns about OSI files
15 and various other things. But you know, part of the -- part
16 of the way that's addressed is through a protective order.
17 So --

18 MR. MACKEY: Your Honor, this is -- I'm sorry.

19 THE COURT: Go ahead.

20 MR. MACKEY: Your Honor, this is Patrick Mackey.
21 Well, you picked -- you hit on one of the issues I wanted to
22 definitely discuss, the use of a protective order. So I
23 believe one might have been circulated before my office was
24 involved in the case, so if it's possible for plaintiff's
25 counsel to circulate that again, we could take a look at it

1 and, you know, obviously have some comments if we feel it
2 necessary, but yeah, definitely would want some type of
3 protective order in place before any documents are produced.

4 Regarding the other issue about a formal response
5 to the document demands, obviously I understand that's the
6 normal procedure, and that would be our intent is to produce
7 the documents with also a formal written response. I guess
8 what I'm considering, though, is it's difficult for us to put
9 a formal written response in without first having the
10 documents in hand, because obviously we'd want to take a look
11 at what we're producing first before submitting written
12 responses to the demands. So I guess whatever time period,
13 your Honor, that you're setting for the disclosure of these
14 documents, I just ask that you please consider that it will
15 take some time for us to get these documents from the state,
16 it will take some time for us to review all of them to
17 determine if anything needs to be redacted or anything needs
18 to be placed in a privilege log, and then once we've had
19 access to those documents and reviewed them all, at that
20 point we could put together a formal response which would
21 accompany the actual documents that are produced.

22 THE COURT: All right. I get that. So I'm trying,
23 I'm trying to make up for a lot of lost time here. So I'm,
24 from time to time, in an effort to narrow the areas of
25 dispute and to forestall objections that are ultimately going

1 to prove to be futile to discovery demands or to encourage
2 more flexibility or narrowing on the part of plaintiffs for
3 things that I think are overbroad, I am going to give you
4 some comments with respect to the issues raised in the
5 July 31st letter.

6 We have a court reporter here and I might suggest
7 you want to order the transcript and be prepared to show it
8 to DOCCS in the not-surprising possibility that they would
9 take a much more restrictive view in terms of what they would
10 produce voluntarily, again, in an effort to try to help focus
11 the parties in their meet-and-confer if there are
12 disagreements and to avoid unnecessary dispositive motion
13 practice.

14 And again, I don't want to suggest for a minute
15 that Aimee Cowan is a pushover in terms of counsel for
16 defendants in civil rights cases, far from it, but she may be
17 able to give you some guidance as to, you know, how similar
18 discovery issues have worked out in other cases and avoid,
19 you know, fighting over stuff that is not going to be very
20 productive.

21 So I'm going to spend a couple minutes and discuss
22 some of the categories of issues that were raised in this
23 letter and hope, again, that it will help narrow disputes.

24 So there are a number of documents requested with
25 respect to a particular defendant, Mitchell, who apparently

1 has been the subject of multiple lawsuits who was suspended
2 and is perhaps subject to an ongoing OSI investigation. I
3 think some of plaintiff's requests are overly broad or not
4 proportional, given the newer emphasis of the rules, you
5 know, so a blanket request for a personnel file I think is
6 asking for a lot of routine administrative stuff that isn't
7 going to prove to be relevant. There are apparently issues
8 with respect to defendant Mitchell involving bullying and
9 sexual harassment, as I understand it, of other DOCCS
10 employees, and I'm not sure how relevant that's going to be
11 with respect to the, you know, the allegations in this case
12 which deal more with excessive force and retaliation in
13 connection with disciplinary charges.

14 There's also a request which we frequently see for,
15 you know, basically any complaints against a particular
16 defendant on certain issues, and this is a case in which,
17 this is an issue in which there are cases all over the lot
18 and this is one where the Western District of New York cases
19 may tend to favor the plaintiffs, but we typically recognize
20 that inmate grievances tend to be filed with great frequency,
21 are often found to be frivolous, and are not cross-referenced
22 by particular officers, and so we look at other categories of
23 information that is available that may be more directly
24 probative of the issues that the plaintiffs would like to
25 establish, and less burdensome for DOCCS to find.

1 So in particular, there is a section of DOCCS
2 called the Labor Relations Section, which maintains files by
3 individual employees which includes, among other things,
4 records of any discipline that is imposed as a result of
5 sustained allegations of misconduct, and so we typically
6 require production of documents from the Labor Relations
7 files that include sustained allegations of misconduct that's
8 similar to that alleged in the particular complaint, or that
9 involves false testimony or false claims or false statements
10 implicating inmates.

11 Similarly, OSI investigations are conducted with
12 some frequency but not in connection with every grievance
13 that's filed and is often a good -- the fact that there is an
14 OSI investigation is a good indicator that there's a more
15 serious allegation that might prove more useful and possibly
16 ultimately helpful to plaintiffs. So I would typically
17 require production of OSI investigations, whether or not they
18 were sustained, again, regarding allegations of misconduct
19 against named defendants which are similar to those in the
20 complaint or other things impacting on credibility like false
21 statements or false testimony.

22 With respect to defendant Mitchell's suspension,
23 the relevance of the materials or the investigations with
24 respect to that might depend on whether it related to
25 misconduct involving inmates or whether it involved other

1 misconduct like sexual harassment of coemployees or something
2 like that. So that may be one that may be subject to more
3 debate and may need to be briefed.

4 Medical records regarding injuries to defendants in
5 connection with particular incidents referenced in the
6 complaint are usually fair game. And again, as I've
7 discussed already, protective orders and the fact that the
8 plaintiffs are represented typically is sufficient to address
9 a lot of DOCCS security concerns which, again, DOCCS counsel
10 tends to rely on reflexively because typically most of the
11 plaintiffs are pro se.

12 The other thing I would say is that security
13 concerns from DOCCS or individual privacy concerns about
14 other inmates may warrant redactions of some of these types
15 of information that are produced, including identifying
16 information with respect to other inmates. And I typically
17 look for, instead of just redacting the names, that there be
18 some unique identifying number or something so that the
19 plaintiff can distinguish, you know, when a reference to a
20 particular inmate is the same inmate in multiple places or
21 whether it's a different inmate.

22 The parties always have to negotiate and try to
23 agree on a reasonable timeframe before and after the
24 incidents in the complaint to look for certain of these
25 records, and as I say, I, you know, while the Western

1 District sometimes requires DOCCS to dig into all the
2 grievances, sustained or not, I have been less likely to do
3 so.

4 It sounds as if Mr. Mitchell may have more of a
5 history than most of the other defendants but the request for
6 similar records for the other named defendants, I think the
7 same general principles would typically, would typically
8 apply.

9 With respect to the OSI investigation of
10 Mr. Mitchell and whether or not it's ongoing, Ms. Cowan and I
11 have addressed this issue in another case, and it's kind of a
12 vexing one, because DOCCS is very reluctant to release
13 preliminary investigative conclusions or work papers when
14 they haven't come to a final resolution. I have in other
15 cases required production of certain types of underlying
16 documents so if, for example, there's an OSI investigation of
17 particular incidents in the complaint, and they've taken
18 statements from the named defendants, I'll typically require
19 that, even if the investigative conclusions aren't yet ready.

20 In terms of the plaintiff's records from DOCCS at
21 Auburn, there seemed to be some resistance to that with prior
22 counsel. You know, I don't think it's burdensome or
23 unreasonable for the plaintiff to look for the disciplinary
24 history of the particular plaintiff, there are printouts that
25 are available that provide summaries of the nature of the

1 charges and things like that which at least can get the
2 plaintiff's attorney started in terms of, you know, whether
3 there's relevant aspects of the plaintiff's history that may
4 become an issue in the litigation. It is typical, you know,
5 there's typically some debate about whether you get into the
6 underlying documents for certain things but it typically
7 helps to start with that printout so that you have a sense
8 of, you know, what the plaintiff's disciplinary history is.
9 If there are aspects of a plaintiff's personal records, and
10 again, we're talking I think just about records from Auburn,
11 if there are aspects of a particular plaintiff's records that
12 the defendants plan to rely upon, that certainly needs to be
13 produced in advance. So if there's, you know, something that
14 DOCCS is suggesting that defense attorneys are going to want
15 to use, that needs to be disclosed in discovery.

16 I am not clear what DOCCS keeps in terms of an
17 inmate's criminal history or criminal prosecutions during
18 custody, but you know, at a minimum they would need to
19 disclose anything that they know of that they would rely upon
20 at trial.

21 On the issue of camera locations, you know, I don't
22 know, have any -- is there any video evidence that's been
23 disclosed so far, Ms. Freeman?

24 MS. FREEMAN: No, there hasn't been any, your
25 Honor.

1 THE COURT: All right. So the incidents in this
2 case were in 2016, so the chances that any video still exists
3 are probably slim to none, and it also, there's some variance
4 over time as to where cameras are positioned and monitored
5 and things like that, so you know, information about camera
6 locations beyond the area where the plaintiff was allegedly
7 assaulted gets into a lot of security concerns and I've found
8 similar requests not proportional in the past. You know, if
9 there's not prompt notification of plaintiff that he wants
10 information preserved in connection with, you know,
11 disciplinary charge or whatever, it's typically recycled in
12 relatively short order and in my experience unlikely to
13 support spoliation claims, so that's an area where, you know,
14 the plaintiff's position may be harder to sustain.

15 So that's, you know, again, off the top of my head
16 guidance, but based on 10 years of doing these, I'm not
17 saying that's how I'm going to rule, I'm not saying you can't
18 brief me and convince me otherwise, but I would really like
19 to encourage both parties to meet and confer on some of these
20 issues with that guidance in mind and try to minimize the
21 areas of dispute that are brought to me.

22 All right. Any questions or need for clarification
23 so far, Ms. Freeman?

24 MS. FREEMAN: The only question I have, your Honor,
25 has to do specifically with inmate grievances against

1 defendant Mitchell specifically, and I understand your
2 summary of the state of Northern District case law and I also
3 understood from meet-and-confer with Ms. Cowan the issue
4 around grievances, I understand not being stored by employee,
5 but I do want to raise this point, and I'll raise it
6 separately in a meet-and-confer with new counsel as well,
7 that because of the uniqueness of Lieutenant Mitchell's
8 situation as alleged in Mr. Raymond's complaint and based on
9 the fact that we have a claim for negligent discipline that
10 is largely based on DOCCS' multi-decade choice to retain
11 Lieutenant Mitchell despite complaints against him going back
12 to 2002, I expect we will ask the court to depart from the
13 ordinary course, specifically as to grievances filed against
14 Lieutenant Mitchell, because the labor file that you
15 referenced, your Honor, if it only hinges on discipline that
16 was actually enacted, obviously it can't help us to
17 substantiate our case of negligent discipline which we
18 believe to be well founded in the allegations.

19 THE COURT: Okay, that's fine, and I guess the only
20 thing I would suggest is take a gander at any OSI reports
21 involving Mitchell first before you decide whether you need
22 to delve into all the grievances, because as I say, even,
23 even if they're not sustained, I think those are typically an
24 indication of more serious allegations and, you know, so
25 that -- I get that.

1 And the other thing I meant to say and I might not
2 have, I don't really have a good idea of what the allegations
3 of, for example, bullying by Mitchell of other employees
4 might include, but to the extent it includes, you know,
5 encouraging other employees to hold the line in terms of
6 denying misconduct or something like that, that might prove
7 to be more relevant and fair game.

8 Mr. Mackey, anything you want to say based on my
9 little recitation?

10 MR. MACKEY: I don't think I have anything else to
11 add.

12 THE COURT: Ms. Buth?

13 MS. MEYERS BUTH: No, thank you, Judge.

14 THE COURT: Ms. Cowan?

15 MS. COWAN: No, your Honor. I will just add, you
16 referenced the disciplinary history printout that is
17 available, I did disclose that back in May so plaintiff's
18 counsel should have a list of that at least.

19 THE COURT: Okay, fair enough. All right. So,
20 what I think, what I think I'm going to do is encourage the
21 parties to talk to each other and encourage defense counsel
22 to talk to Ms. Cowan and to talk to Mr. Quackenbush at DOCCS
23 counsel and get a little better idea of the lay of the land,
24 and then maybe in -- by January 17, send me a status report,
25 hopefully with consensus deadlines for, you know, responding

1 to discovery and/or responding to the various discovery
2 issues raised by Ms. Freeman or the schedule going forward
3 or, failing that, asking for a follow-up phone conference
4 because you can't agree on anything, in which case we'll try
5 to sort it out.

6 You know, I understand, Ms. Freeman, your desire to
7 have a deadline for, you know, responses to the various
8 discovery responses and, you know, certainly with respect to
9 the interrogatories addressed to the individual defendants
10 there's no reason why the lawyers shouldn't be getting on
11 that right away, but with respect to document production, for
12 example, they're going to have to get DOCCS on board and I
13 know from my past experience that that can be a challenge
14 even for the veteran AAGs and so for outside counsel it might
15 even be more vexing. So I would --

16 MS. FREEMAN: I'm happy to work with defense
17 counsel on that, your Honor.

18 THE COURT: Okay. Is there anything else anybody
19 thinks we should discuss this afternoon?

20 MS. COWAN: Your Honor, I just -- I was just going
21 to say I don't know what the court wants to do with respect
22 to the John Doe defendant that's remaining, I understand I'm
23 still the lead attorney for that defendant. I know the
24 deadlines have already passed as far as amendment of
25 pleadings but I wasn't sure if the court was going to extend

1 that deadline or require me to stay on this case for this
2 John Doe defendant.

3 THE COURT: I think you need to get off for sure.

4 MS. COWAN: Okay.

5 THE COURT: And in fact Nicole wrote that down on
6 my list of things to talk about and I skipped over it so I'm
7 glad you raised it. You know, Ms. Freeman, I think one of
8 the things you should discuss with opposing counsel and let
9 me know in the status report is whether there -- you know,
10 you've exhausted your efforts to identify John Does or
11 whether the delay in the discovery has impeded those efforts
12 and you want some additional time to try to do that.

13 MS. FREEMAN: Sure, your Honor, I'm happy to give
14 you an update by the 17th. I can say now, though, that we
15 don't have the discovery necessary to identify the Doe
16 defendant. I think we have exhausted the materials we have
17 and it seems likely to me and my colleague on the case that
18 we may need at least a deposition or two of some of the key
19 defendants before we're able to make that identification, so
20 we will and are now seeking an extension of that deadline if
21 the court's amenable.

22 THE COURT: Okay. Well, that's fair enough, you
23 know, and you can see if there's any resistance from defense
24 counsel but that seems reasonable to me, so I think we just
25 leave John Doe unrepresented for now. I think sometimes the

1 AAGs enter appearances on behalf of everybody including John
2 Does but I think more typically in our civil litigation they
3 remain unrepresented until we find out who they are. So
4 we'll just take you off as counsel and, you know, if
5 somebody's identified, we'll address whether Mr. Mackey has
6 any conflicts with respect to them or not.

7 MS. COWAN: Thank you, your Honor.

8 THE COURT: Okay. Anything else?

9 MS. MEYERS BUTH: Cheryl Meyers Buth, your Honor, I
10 spoke to Ms. Freeman a couple weeks ago, one of the things
11 that I do not see reflected anywhere is whether there's been
12 a settlement demand made by the inmate or any discussions of
13 settlement.

14 THE COURT: So the way this --

15 MS. FREEMAN: Sorry, your Honor, go ahead.

16 THE COURT: The way this usually works, and
17 Ms. Cowan can maybe give you some guidance on this, the
18 settlement process through DOCCS and the state is probably
19 even more treacherous than the discovery path, and so it is
20 typical that we wait until we get down the road a little bit
21 with discovery. And what typically I think the defense
22 attorneys look for is a demand from the plaintiffs, you know,
23 educated by some of the discovery, and then the -- either
24 DOCCS counsel or the AAG or in this case private counsel
25 makes a judgment as to whether it's in the ballpark and

1 whether it's worth trying to start that process. But it's,
2 you know, it's -- I think that's another thing that's kind of
3 tricky for outside counsel to handle and Ms. Cowan can maybe
4 give you some advice as to how to broach that subject and
5 when it's typically most productive to do so. Okay?
6 Anything further?

7 MS. FREEMAN: Not from plaintiff, your Honor, and
8 Ms. Buth and Mr. Mackey, I will send you the draft protective
9 order that I had written many months ago and we can have a
10 discussion about it offline.

11 MR. MACKEY: Thank you.

12 THE COURT: Thanks everybody, happy holidays.

13 (Proceedings Adjourned, 3:08 p.m.)
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